

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION**

APPLETON PAPERS INC. and)
NCR CORPORATION,)
)
Plaintiffs,)
)
v.) No. 08-CV-00016-WCG
)
GEORGE A. WHITING PAPER)
COMPANY, et al.,)
)
Defendants.)

**CERTAIN DEFENDANTS¹ PROPOSED FINDINGS OF FACT IN SUPPORT OF THEIR
MOTION FOR PARTIAL SUMMARY JUDGMENT OR, IN THE ALTERNATIVE,
MOTION IN LIMINE**

Certain Defendants hereby submit the following proposed findings of fact supporting their motion for summary judgment pursuant to Fed. R. Civ. P. 56, Civil L.R. 7.1, and Civil L.R. 56.2. Factual citations are to depositions conducted in this case, documentary evidence entered into the record, expert reports, government reports, or to pleadings and other documents on file with the Court as indicated.

PARTIES

1. Plaintiff Appleton Papers Inc. (“API”) is a Delaware corporation with its principal place of business in Appleton, Wisconsin. (Seventh Am. Compl. (Doc. 265) (Ex. 13)).

¹ These proposed findings of fact are filed on behalf of the following defendants: Georgia-Pacific Consumer Products LP (f/k/a Fort James Operating Company), Fort James Corporation, Georgia-Pacific LLC (“Georgia-Pacific”), CBC Coating, Inc., Menasha Corporation, P.H. Glatfelter Company, US Paper Mills Corporation, and WTM I Company.

2. Plaintiff NCR Corporation (“NCR”) is a Maryland corporation with its principal place of business in Dayton, Ohio. *Id.*

3. Defendant P.H. Glatfelter Company is a Pennsylvania corporation with its principal place of business in York, Pennsylvania. (Glatfelter’s Answer, Affirmative Defenses, and Counterclaim to Plaintiffs’ Seventh Amended Complaint (Doc. 298) (Ex. 14)).

4. Defendant Menasha Corporation is a Wisconsin corporation with its principal place of business in Neenah, Wisconsin. (Menasha Corporation’s Answer to Seventh Amended Complaint and Counterclaims (Doc. 293) (Ex. 33)).

5. Defendant WTM I Company is a Delaware corporation with its principal place of business in Las Vegas, Nevada. (Answer and Counterclaims of WTM I Company To The Seventh Amended Complaint (Doc. 300) (Ex. 15)).

6. Defendant U.S. Paper Mills Corp. is a Wisconsin corporation with its principal place of business in De Pere, Wisconsin. (U.S. Paper Mill Corp.’s Answer To Seventh Amended Complaint, Affirmative Defenses and Counterclaim (Doc. 283) (Ex. 35)).

7. Defendant Georgia-Pacific Consumer Products LP is a Delaware limited partnership with its principal place of business in Atlanta, Georgia and was formerly known as Fort James Operating Company; Defendant Georgia-Pacific LLC is a Delaware limited liability corporation with its principal place of business in Atlanta, Georgia (Doc. 310) (Ex. 16)).

8. Defendant Fort James Corporation is a Virginia corporation with its principal place of business in Atlanta, Georgia. (GP’s Amended Answer, Affirmative Defenses and Counterclaim to Plaintiffs’ Seventh Amended Complaint (Doc. 310) (Ex. 16)).

9. Defendant CBC Coating, Inc. is a Wisconsin corporation with its principal place of business in Appleton, Wisconsin. (CBC Coating, Inc.’s Amended Answer, Affirmative Defenses and Counterclaim to Plaintiffs’ Seventh Amended Complaint (Doc. 327) (Ex. 36)).

JURISDICTION

10. This Court has jurisdiction over the subject matter of this action pursuant to Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and 28 U.S.C. § 1331 (federal question).

11. Venue is proper in this District pursuant to Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and 28 U.S.C. § 1331(b), because events giving rise to the claims stated in the Seventh Amended Complaint, including the alleged releases of hazardous substances, occurred in this District, and the Lower Fox River is located entirely within this District.

STATEMENT OF UNDISPUTED MATERIAL FACTS

12. In 1966 the Combined Locks Paper Company changed its name to Combined Paper Mills, Inc. (“CPM”). (API-GF039124-Appleton Papers Chronology (Ex. 1)).

13. In 1969 NCR acquired CPM. *Id.*

14. In 1907 Appleton Coated Papers Company (“ACPC”) was founded at Appleton, Wisconsin. *Id.*

15. In 1970, NCR acquired ACPC as a wholly-owned subsidiary of NCR. *Id.*

16. On June 21, 1971, NCR merged its two subsidiaries, Combined Paper Mills, Inc. and Appleton Coated Paper Company, to create Appleton Papers, Inc., a subsidiary of NCR. *Id.*

17. On January 1, 1973 Appleton Papers, Inc. merged with NCR and changed from a subsidiary of NCR to a division of NCR. *Id.*

18. From 1954 to 1971, NCR manufactured an emulsion that contained polychlorinated biphenyls (“PCBs”) that NCR’s licensee ACPC, and later NCR, applied as a coating to carbonless copy paper (“NCR Paper”) manufactured by NCR. (NCR’s Resp. to GP’s Interrog. #2 (Ex. 2); NCR’s Resp. to Glatfelter’s Interrog. #1 (Ex. 3)).

19. From 1954 to 1971, under contract to NCR, ACPC applied this emulsion to NCR Paper at a coating facility in Appleton, Wisconsin (“the Appleton Plant”). (NCR’s Resp. to GP’s First Set of Interrog. at 8, 4-5 (Ex. 2)).

20. From 1954 to 1971, ACPC, and then NCR, discharged wastewater containing PCBs from the Appleton Plant to the Lower Fox River. (Charles P. Klass Decl. (“Klass Decl.”) ¶ 9 (Ex. 6); Dennis Hultgren Dep. 16:21-17:23, 28:23-40:1 (Ex. 8); Gerald Taylor Dep. 209:25-213:14 (Ex. 9); Proposed Remedial Action Plan Lower Fox River and Green Bay (“PRAP”) at 5-6 (Ex. 10)).

21. From 1969 to 1971, NCR Paper was also produced at a facility in Combined Locks, Wisconsin that NCR acquired in 1969. (NCR’s Resp. to GP’s Interrog. #2 (Ex. 2); NCR’s Resp. to Glatfelter’s Interrog. #1 (Ex. 3)).

22. From 1969 to 1971, NCR discharged wastewater containing PCBs from the Combined Locks Mill to the Lower Fox River with little to no treatment. (Klass Decl. ¶¶ 11, 12 (Ex. 6); Dennis Hultgren Dep. 16:21-17:23 (Ex. 8); PRAP at 5-6 (Ex. 10)).

23. From 1954 to 1971, ACPC, and then NCR, sold production scrap (known as “broke”) from the coating of NCR Paper to recycling mills. (NCR’s Resp. to GP’s Interrog. #3 (Ex. 2); Alan Kresch Dep. 80:19-81:17 (Ex. 11); Donald Christensen Dep. 47:5-49:19 (Ex. 12); Klass Decl. ¶ 13 (Ex. 6)).

24. Some of the recycling mills which purchased broke from ACPC and NCR discharged to the Fox River. (Klass Decl. ¶ 14 (Ex. 6); PRAP at 5-6 (Ex. 10); Seventh Am. Compl. ¶¶ 31-51 (Ex. 13); Glatfelter’s Answer to Seventh Am. Compl. ¶ 32 (Ex. 14); WTM’s Answer to Seventh Am. Compl. ¶ 48 (Ex. 15)).

25. The recycling mills’ wastewater discharge from recycling broke purchased from ACPC and NCR from 1954 to 1971 was treated to varying degrees and contained PCBs. (Klass Decl. ¶ 14 (Ex. 6); PRAP at 5-6 (Ex. 10)).

26. The practice of selling broke for recycling continued after the Spring of 1971. (Donald Christensen Dep. 63:19-24 (Ex. 12)).

27. The broke sold after the Spring of 1971 did not contain PCBs. (NCR's Resp. to Glatfelter's Interrog. #1 (Ex. 3); NCR's Resp. to CBC's Req. for Admis. #121 (Ex. 17); Klass Decl. ¶ 15 (Ex. 6)).

28. From 1954 until the inventory of PCB-containing NCR Paper was used up some time shortly after Spring 1971, NCR sold PCB-containing NCR Paper to printers and converters of business forms. (Klass Decl. ¶ 16 (Ex. 6); Dennis Hultgren Dep. 16:21-18:12 (Ex. 8)).

29. Printers and converters of business forms sold their production scrap to recycling mills. (James Haney Dep. 67:24-68:8 (Ex. 18); Donald H. DeMeuse Dep. 65:13-23 (Ex. 19); Roy Geigel Dep. 19:19-22 (Ex. 20); Walter Charles Dep. 55:25-56:16 (Ex. 21)).

30. From 1954 until the inventory of PCB-containing NCR Paper was used up some time shortly after Spring 1971, production scrap from printers and converters of business forms contained PCBs. (Klass Decl. ¶ 16 (Ex. 6); Dennis Hultgren Dep. 16:21-18:12 (Ex. 8)).

31. Wastewater discharges from Fox Valley recycling mills recycling production scrap from printers and converters from 1954 until some time shortly after Spring 1971 contained PCBs. (Klass Decl. ¶ 16 (Ex. 6)).

32. Some recycling mills recycled some post-consumer wastepaper grades. (Klass Decl. ¶ 18 (Ex. 6); Dennis Hultgren Dep. 16:21-18:12 (Ex. 8)).

33. From 1954 until the last sheets of PCB-containing NCR Paper were removed from the waste paper stream, recycling mills that used post-consumer wastepaper grades discharged wastewater containing PCBs to the Fox River after varying degrees of treatment. (Klass Decl. ¶ 18 (Ex. 6)).

34. Of all the sources of PCBs sent to recycling mills, post-consumer wastepaper was the least concentrated source. (Klass Decl. ¶ 19 (Ex. 6)).

35. The United States Environmental Protection Agency concluded that “[n]inety-eight percent of the total PCBs released into the Lower Fox River had been released by the end of 1971.” (EPA’s Record of Decision, Operable Unit 1 and Operable Unit 2, Lower Fox River and Green Bay, Wisconsin (“ROD”) at 4 (Ex. 23)).

36. Much of the total PCBs released to the Lower Fox River had been released by the end of 1971. (Comments of Appleton Papers Inc. and NCR Corporation on the Draft Remedial Investigation, Feasibility Study, Baseline Human health and Ecological Risk Assessment, Model Development Report and Proposed Remedial Action Plan for Lower Fox River and Green Bay (“NCR/API Comments on PRAP”) at 41 (Ex. 24)).

37. In 2002, plaintiffs took the position that the discharge of PCBs to the Lower Fox River during the period when PCBs were used in the formulation of the emulsion for

NCR Paper (the “Production Period”) was more than 690,000 pounds. (NCR/API Comments on PRAP at 40-41 (Ex. 24); Comments of Appleton Papers Inc. and NCR Corporation on the January 15, 1999 Revision of Technical Memorandum 2d (“NCR/API Comments on Tech Memo”) 3-6 (Ex. 25) (arguing that EPA underestimated PCB releases during Production Period)).

38. Some of the defendants have taken the position that the discharge of PCBs to the Lower Fox River during the Production Period was less than 690,000 pounds. (Comments of the P.H. Glatfelter Company to the Proposed Remedial Action Plan Lower Fox River and Green Bay (“Glatfelter Comments on PRAP”) 26-29 (Ex. 26)).

39. Plaintiffs’ experts do not offer an opinion that, during the period after PCBs were replaced in the formulation of the emulsion used in NCR Paper (the “Post-Production Period”) actions by the recycling mills would have made a meaningful difference for purposes of this case with respect to PCBs discharged to the Lower Fox River. (Moore Dep. 20:25-29:11 (Ex. 27); Walter J. Shields Dep. 20:5-27:7 (Ex. 28)).

40. Plaintiffs’ expert on recycled paper markets does not offer any opinion concerning the Production Period. (Moore Dep. 20:25-29:11 (Ex. 27)).

41. EPA has found that the total mass of PCBs discharged to the Lower Fox River was approximately 690,000 pounds, about 675,000 pounds of which occurred prior to the end of 1971. (PRAP at 6 (Ex. 10)).

42. The Appleton Plant received about 30 million pounds of PCBs in the emulsion used to coat NCR Paper. (PRAP at 6 (Ex. 10); Klass Decl. ¶ 21 (Ex. 6); Comments of Appleton Papers Inc. and NCR Corporation on the January 15, 1999 Revision of Technical Memorandum 2d (“NCR/API Comments on Tech Memo”) 7 (Ex. 25)²; GLTFOX00002789-GLTFOX00002792 (Ex. 37)).

43. Most of the recycling mills and wastewater treatment plants began sampling their outfalls for PCBs in the early 1970s. (NCR-FOX-0126982 (Ex. 29); Defendant P.H. Glatfelter Company’s Response and Objections to Plaintiff NCR Corporation’s First Set of Interrogatories and Requests for the Production of Documents at 7-11 (Ex. 30); Defendant P.H. Glatfelter Company’s Amended Responses and Objections to Plaintiff Appleton Papers Inc.’s First Set of Interrogatories to Defendant P.H. Glatfelter Company at 7-8 (Ex. 31); Georgia-Pacific Consumer Products LP’s (f/k/a Fort James Operating Company’s), Fort James Corporation’s and Georgia-Pacific LLC’s Objections and Responses to Plaintiff NCR Corporation’s First Set of Interrogatories and Requests for Production of Documents at 7-8 (Ex. 32); Responses of WTM I Company to Appleton Papers Inc.’s First Set of Interrogatories and Requests for the Production of Documents at 5-6 (Ex. 4); Responses of Defendant WTM I Company to NCR’s First Set of Interrogatories and Requests for the Production of Documents at 5-6 (Ex. 5); Defendant Menasha Corporation’s First Amended and Supplemental Responses and

² Approximately two-thirds of the approximately 45 million pounds of PCBs used to coat NCR Paper went to the Appleton facility.

Objections to Plaintiff NCR Corporation's First Set of Interrogatories and Requests for the Production of Documents at 28 (Ex. 7); Defendant U.S. Paper Mills Corp.'s Responses to Plaintiff NCR Corporation's First Set of Interrogatories and Requests for the Production of Documents at 6 (Ex. 22)).

44. All of the sources of PCBs to the Fox River ended in or about 1971 except for recycling post-consumer wastepaper. (Klass Decl ¶ 20 (Ex. 6)).

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Respectfully submitted,

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